UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 17-2770-ABJ
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

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INTRODUCTION

On February 27, 2015, Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Anne Weismann (with CREW, "Plaintiffs") filed an administrative complaint with the Federal Election Commission ("FEC") asserting, among other things, a claim that the true source or sources of a $1.7 million contribution to a political committee had unlawfully hidden their identity, in violation of the Federal Election Campaign Act ("FECA"). Because Plaintiffs did not know the identity of the true source, they identified the true source as "Unknown Respondent." While the FEC investigated and resolved Plaintiffs' other allegations, it dismissed Plaintiffs' claim against Unknown Respondent. The FEC dismissed despite its own investigation identifying two parties that it suspected were true sources of the reported contribution. Plaintiffs accordingly sought judicial review of that dismissal.

The FEC here asserts, however, that the Court lacks jurisdiction over this suit and, alternatively, that Plaintiffs have failed to state a claim. In support of that argument, the FEC makes broad claims that it has unreviewable discretion and that Plaintiffs should simply be happy with the resolution the FEC was able to achieve on Plaintiffs' other claims. In support of its arguments, it mischaracterizes Plaintiffs' claims, misstates the facts in the record, and makes unsupported assertions of law.

Plaintiffs' suit does not "expand FECA's judicial review provision." *Cf.* FEC Mot. 10. Courts may review the FEC's nonenforcement decisions under § 30109(a)(8) of the FECA. The FEC routinely considers complainants' claims against unknown respondents, and where it dismisses such a claim, courts have reviewed that, too. Courts have also reviewed FEC nonenforcement decisions that result in partial dismissals of complaints, where the FEC resolves other allegations successfully. This suit raises no novel issue about the scope of judicial review.

Indeed, it is the FEC's arguments that are novel. The FEC would grant itself unreviewable authority to pick and choose among respondents and claims. It would also grant itself power to excuse anyone making an unlawful conduit contribution, so long as that person used two or more straw donors to hide behind. But there is no legal basis for its arguments. Accordingly, Plaintiffs respectfully request the Court deny the FEC's motion to dismiss.

STATUTORY AND REGULATORY BACKGROUND

The FECA and implementing FEC regulations require a political committee to report the identity of any person who makes over $200 in contributions annually to the committee. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4)(i). To ensure the public learns the true source of a contribution and to prevent the reporting of mere pass-through entities as sources, the FECA and implementing FEC regulations prohibit making a contribution in the name of another, knowingly permitting one's name to be used for the purpose of making a contribution in the name of another, knowingly accepting a contribution made by one person in the name of another, and assisting the making of a contribution in the name of another. 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b); *see also United States v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1999).

The "true source" of a contribution is a term of art under the FECA: it refers to the person or persons who "initiate or instigate or have some significant participation in the plan or scheme to make a contribution." FEC, Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989). It does not refer only "to the person who actually transmits the funds" or the person "who merely transmitted the campaign gift." *United States v. O'Donnell*, 608 F.3d 546, 550, 554 (9th Cir. 2010); *accord United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011). The "true source" is the person who "made the gift by arranging for his money to

finance the donation." *O'Donnell*, 608 F.3d at 550; *United States v. Kanchanalak*, 192 F.3d 1037, 1044 (D.C. Cir. 1999) ("To donate ordinarily signifies the act of giving away something over which the giver has control or sovereignty.").

Under the FECA, any person who believes there has been a violation of the Act may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person or entity alleged to have violated the Act, facts developed by the Office of General Counsel ("OGC"), and any OGC recommendation, the FEC then votes on whether there is "reason to believe" a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). A "reason to believe" exists where a complaint "credibly alleges" a violation of the FECA "may have occurred." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007). If four commissioners find there is "reason to believe" a violation of the FECA has occurred, the FEC must notify the respondents of that finding and "shall make an investigation of such alleged violation." 52 U.S.C. § 30109(a)(2).

If four commissioners fail to find reason to believe a violation of the FECA has occurred and the Commission then dismisses the matter by closing it, the complainant, as a "party aggrieved" by the dismissal, may seek judicial review of the failure to find reason to believe in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

FACTUAL BACKGROUND

Plaintiffs' Administrative Complaint

On February 27, 2015, Plaintiffs filed an administrative complaint with the FEC against American Conservative Union ("ACU"), Now or Never PAC, and James C. Thomas, III in his capacity as treasurer for Now or Never PAC. Compl. ¶ 24; *see also* Admin. Compl., MUR 6920 (Feb. 27, 2015) (attached as Ex. A), https://bit.ly/2rfbeFe.[1] The administrative complaint alleged ACU had permitted its name to be used to effect a contribution in the name of another by acting as a conduit for a $1.7 million contribution to Now or Never PAC in violation of the FECA, and that Now or Never PAC and Thomas knowingly accepted that contribution in the name of another. Compl. ¶ 24; Ex. A (Admin. Compl.) ¶¶ 14, 20 . The complaint also alleged that Unknown Respondent, the "true source" or sources of that contribution, also violated the FECA by making the contribution in the name of another. Compl. ¶ 24; Ex. A (Admin. Compl.) ¶ 12.

Plaintiffs used the pseudonym "Unknown Respondent" because Plaintiffs were not—and are still not—aware of the name or names of the source or sources of the contribution ultimately received by Now or Never PAC. Nevertheless, Plaintiffs used a pseudonym commonly used in FEC proceedings to identify respondents for whom the complainant does not know the name. Plaintiffs also described Unknown Respondent: they were the "true source" of the contribution to Now or Never PAC, as that term is used in the FECA. Compl. ¶ 24.

Accordingly, Plaintiffs' administrative complaint named four sets of respondents. First, the ultimate recipient of the contribution who falsely reported the source of the contribution. Compl. ¶ 24. Second, the one known pass-through agent that allowed its name to be falsely used

[1] Documents referred to as Exhibits that are not otherwise attached to the Complaint (*i.e.*, Compl. Ex. __) are attached to the Declaration of Stuart McPhail in Support of Plaintiffs' Opposition to Defendant FEC's Motion to Dismiss, filed herewith.

as the source of the contribution. *Id.* Third, the treasurer of the ultimate recipient who, because the ultimate recipient was a political committee, was personally liable for any violations of the FECA. *Id.* Fourth and most relevant here, Plaintiffs named the true source or sources as respondents, specifically, the unknown person or persons who first directed the funds to be contributed to Now or Never PAC and who hid their name beyond the elaborate straw donor scheme. *Id.*

OGC's Investigation and Recommendations

Based on Plaintiffs' administrative complaint, the OGC recommended finding reason to believe that ACU violated 52 U.S.C. § 30122 by "knowingly permitting its name to be used to effect" a contribution in the name of another. First General Counsel's Report at 7, 10, MUR 6920 (Jan. 20, 2016) (attached as Ex. B), https://bit.ly/2Ku9bW7. The OGC further recommended finding reason to believe that Unknown Respondent, the "true source of the $1.71 million contribution," violated the FECA. *Id.* at 3, 10. The OGC recommended taking no action against Now or Never PAC and Thomas at that time, but did recommend developing further information as to them. *Id.* at 10. More than a year after the OGC recommended finding reason to believe, the Commission unanimously voted to approve the OGC's recommendations on January 24, 2017. Compl. Ex. 7. The Commission also voted to approve compulsory process. *Id.* Consequently, the FEC opened an investigation into the matter. *See* Compl. Ex. 2 at 2.

During its investigation, the OGC issued a Second General Counsel's Report. Second General Counsel's Report, MUR 6920 (July 5, 2017) ("2d OGC Rep.") (attached as Ex.C), https://bit.ly/2HKjPpQ. The Second General Counsel's Report recommended finding that both Now or Never PAC and Thomas knowingly and willfully violated the FECA by accepting a contribution in the name of another, and that Thomas additionally knowingly and willfully

violated the FECA by making a contribution in the name of another. *Id.* at 1. The Second General Counsel's Report also recommended finding reason to believe a new entity, Government Integrity LLC ("GI LLC"), violated the FECA. *Id.*[2]

The basis for that finding was that GI LLC provided ACU with $1.8 million—enough to cover the $1.7 million contribution plus a 5% fee—on the same day ACU sent the funds to Now or Never PAC. Compl. ¶ 26. Moreover, Thomas, who was GI LLC's attorney as well as Now or Never PAC's treasurer, handled both transfers and participated in correspondence with ACU where ACU promised to "take action immediately upon receipt" of the transfer. *Id.* Based on its investigation, the FEC found that GI LLC "provided the funds to ACU" that ACU then passed on to Now or Never PAC. Ex. C (2d OGC Rep.) at 3. On July 11, 2017, the Commission voted unanimously to adopt the OGC's recommendations with respect to GI LLC, Thomas, and Now or Never PAC. Compl. Ex. 6. The Commission did not vote to add GI LLC as a respondent to Plaintiffs' Complaint, *id.*, but rather voted to "[s]ubstitute" GI LLC "in the place of 'Unknown Respondent' in the Commission's previous findings." *Id.* In other words, the Commission voted to transfer its previous reason to believe finding that the immediate provider of the funds to ACU participated in the unlawful contribution. The OGC did not recommend finding, however, and Commission did not vote to find, that GI LLC was the true source of the contribution. *See generally,* Ex. C (2d OGC Rep.). Thus, the FEC made no determination whether GI LLC was

[2] Notably, the OGC made this recommendation after it "designated GI LLC and Thomas (both in his individual capacity and as an agent of GI LLC) as respondents and notified them of the Complaint." *Id.* at 3; *see also* FEC, OGC Enforcement Manual § 3.2.3 (June 26, 2013), https://bit.ly/2KppFyz (noting FEC staff may *sua sponte* identify respondents relevant to proceedings). This occurred without any vote by the Commission to include these two as respondents and before the Commission considered the OGC's recommendation whether to find reason to believe the two violated the FECA. *Compare id.* and Compl. Ex. 6.

the "Unknown Respondent" identified in Plaintiffs' complaint, or that there were no other Unknown Respondents.

In fact, the OGC's investigation revealed facts demonstrating that GI LLC was not itself the true source of the contribution. Compl. ¶ 27. The investigation instead revealed that GI LLC, like ACU, was merely a pass-through entity. *Id.* GI LLC had only been formed a few weeks before it passed the funds to ACU, and an as-yet unidentified trust (the "Doe Trust") wholly funded GI LLC. *Id.* In fact, that Doe Trust, with the help of its unidentified trustee (the "Doe Trustee," and together with the Doe Trust, the "Does"), transferred sufficient funds ($2.5 million) to cover GI LLC's transfer to ACU on the same day as GI LLC's transfer. *Id.*[3] As with ACU, Thomas's correspondence once again confirmed GI LLC was merely a pass-through, stating that "[t]he $2.5 million is here [at GI LLC]. I am about to write the $1.8 million to American Conservative Union." *Id.*[4]

On the basis of these facts, the OGC identified one or both of the Does as the likely true source of the contribution to Now or Never PAC. Compl. Ex. 2 at 3 n.5. At some time between the FEC's January 24, 2017 vote finding reason to believe Unknown Respondent violated the FECA and August 3, 2017, when the Does submitted a designation of counsel, Statement of Designation of Counsel (Aug. 3, 2017) (attached as Ex. D), https://bit.ly/2w5w0vS, the OGC designated the Does as respondents and provided them with a copy of Plaintiffs' administrative complaint and the agency's Factual and Legal Analyses. Compl. Ex. 2 at 3 n.5; Circulation of

[3] Pursuant to a court order, the FEC is not currently able to disclose the name of the trust or identity of the trustee. Accordingly, the FEC materials that identify the true name of the John Doe Trust and John Doe Trustee are redacted. Compl. ¶ 3 n.1.

[4] *See also* FEC Consent Mot. to Expedite Briefing and Consideration of Appeal, *Doe v. FEC* No. 18-5099 (D.C. Cir. Apr. 26, 2018) (stating "Doe [trust] was the undisputed source of the contribution at issue").

Discovery Documents at 2 n.4 (Aug. 4, 2017) (attached as Ex. E), https://bit.ly/2rjkt6P (citing Thomas Response to Subpoena dated July 28, 2017 as source for statements about Does); *see also* Ex. C (2d OGC report) at 3 (noting GI LLC was first designated as respondent and then provided with the complaint).[5]

Despite these advances, the FEC's investigation did not proceed smoothly. Over the course of the FEC's investigation, the respondents "either delayed or declined [OGC] requests for additional factual information and documents pertaining to the transaction." Ex. C (2d OGC Rep.) at 8; *see also* Compl. ¶ 28. That intransigence included the Does, who were served with a subpoena but who refused to respond by the deadline. Compl. Ex. 2 at 5. Further, even after promising production by a delinquent post-deadline date, the Does still failed to respond even then. *Id.* Rather, they "informed OGC the following day that [the Does] 'cannot comply' with the Commission's Subpoena and Order." *Id.* The Does' efforts to evade the subpoena led to the OGC recommending the FEC pursue a civil suit against them. *Id.* at 14.

Nevertheless, notwithstanding these difficulties, the OGC recommended to the Commission that it find reason to believe the Does either made or assisted in making a contribution in the name of another. Compl. Ex. 2 at 15. The OGC's alternative recommendations stemmed from the fact that it could not definitively determine whether one or

[5] Only respondents are provided with complaints. *See* 52 U.S.C. § 30109(a)(1); *see also id.* § 30109(a)(12) (prohibiting FEC from disclosing fact of investigation to anyone other than respondents). There is no requirement that the Commission vote to designate someone as a respondent; rather, the OGC may do that on its own. OGC Enforcement Manual § 3.2.3 (describing method OGC identifies and notifies respondents). Accordingly, the record shows the Does were in fact designated as respondents to Plaintiffs' administrative complaint by the OGC. To the extent there is any lack of clarity in the record about whether the Does were identified as respondents, the FEC's failure to provide the record contemporaneously with this motion to dismiss "gives rise to an inference that the evidence is unfavorable to [it]." *Huthnance v. DC*, 722 F.3d 371, 378 (D.C. Cir. 2013).

more of the Does were the true source of the contribution, or were merely pass-through entities themselves. *See id.* at 9–14.

FEC Dismisses Claim Against Unknown Respondent(s)

Despite the significant evidence behind the OGC's recommendation, the Commission on September 20, 2017 split two-to-three on the OGC's recommendation to find reason to believe the Does were either the true source of the contribution to Now or Never PAC, or at least assisted in making the contribution. Compl. Ex. 4. Rather, the Commission voted 5-0 to find "probable cause" to believe ACU violated 52 U.S.C. § 30122 and 11 C.F.R. § 100.4(b)(1)(ii), to authorize the OGC to pursue conciliation with Now or Never PAC, ACU, Thomas, and GI LLC, and to "[t]ake no action at this time on the remaining recommendations of the [OGC]." *Id.*

Shortly thereafter, on October 24, 2017, the Commission voted to adopt a conciliation agreement with ACU, GI LLC, Thomas, and Now or Never PAC. Compl. ¶ 30, Ex. 8. Per the agreement, ACU, GI LLC, Thomas, and Now or Never PAC agreed not to contest the Commission's conclusion that they violated 52 U.S.C. § 30122, and Now or Never PAC and Thomas agreed not to contest they violated 52 U.S.C. § 30104(b)(3)(A). Compl. ¶ 30, Ex. 3. Notably, no party to the conciliation admitted to being the true source of the contribution, nor did the FEC identify any party to the agreement as such. *See generally* Compl. Ex. 3. Rather, on the same day it approved the conciliation agreement, the FEC "[c]lose[d] the file" on Plaintiffs' administrative complaint, dismissing all remaining respondents and claims. Compl. Ex. 8.

On December 19, 2017, Commissioner Ellen Weintraub issued a Statement of Reasons explaining her vote to adopt the OGC's recommendations with respect to the Does and her reasons for disagreeing with three commissioners' decision to dismiss Plaintiffs' claims against Unknown Respondent(s). Compl. Ex. 1. Commissioner Weintraub noted the strong evidence

already in possession of the OGC showing GI LLC received the funds it transmitted to ACU from one or both of the Does and that one or both of them were potentially the true source of the contribution. *Id.* at 2. She wrote that it was the same sort of evidence the Commission had found sufficient to vote to find reason to believe GI LLC had violated the FECA. *Id.* She also noted that the respondents had "refused to cooperate" with the FEC's investigation. *Id.*

Commissioner Weintraub's statement also revealed for the first time that the Does were pursuing a civil action against the FEC to seek a gag order to prevent the FEC from releasing their names to the public. *Id.*; *see also Doe v. FEC*, 17-cv-2694-ABJ (D.D.C. filed Feb. 19, 2017). Plaintiffs unsuccessfully sought to intervene in that litigation, but were granted permission to submit an amicus. Br. of CREW and Anne Weismann as Amici Curiae, *Doe v. FEC*, 17-cv-2694-ABJ (D.D.C. Feb. 12, 2018). On March 23, 2018, the Court granted judgment to the FEC. *Doe v. FEC*, 17-cv-2694-ABJ, 2018 WL 1461964 (D.D.C. Mar. 23, 2018). On April 10, 2018, the Court granted the unopposed motion to stay the judgment while appeal was taken, subject to the Does' agreement to pursue expedited briefing. Minute Order, *Doe v. FEC*, 17-cv-2694-ABJ (D.D.C. Apr. 10, 2018).

On December 20, 2017, two of the three commissioners who voted against OGC's recommendation to find reason to believe the Doe entities violated 52 U.S.C. § 30122, and who voted to close the file and dismiss Plaintiffs' claims against the true source, issued a Statement of Reasons. Compl. Ex. 5. They explained why they voted to dismiss Plaintiffs' claims against Unknown Respondent(s). *Id.* First, they stated that the legal theory of liability of a true source was "unclear" because here the true source had used more than one intermediary entity as a pass-through. *Id.* at 2 ("[T]here is scant legal precedent applying 52 U.S.C. § 30122's 'true source' rule to funders three or four layers behind the reportable contribution to a Super PAC."). They

said it was enough to find that a non-profit could violate § 30122 by passing on a contribution to a super PAC and allowing its name to be used for a contribution in the name of another. *Id.* Secondly, the two commissioners cited the "[r]isk" that the statute of limitations would expire. *Id.* at 3–4. In doing so, they assumed that conciliation with ACU, GI LLC, Thomas, and Now or Never PAC could not proceed so long as an investigation continued with respect to the true source. *Id.* Further, they assumed, contrary to authority, that the five-year statute of limitations would impede their ability to obtain equitable relief against any remaining respondent. *Id.* Thirdly, in a terse section, the two commissioners also stated that prosecutorial discretion supported their decision to dismiss claims because the Commission had pursued claims against "the central respondent," without explaining who that was. *Id.* at 4–5, & n.17. Finally, the two commissioners stated that the "[p]ublic [i]nterest was [s]erved by the Commission's [d]ecision" to dismiss, because the Commission nevertheless entered into a conciliation agreement with some of the respondents. *Id.* at 5.

On December 22, 2017, within sixty days of the FEC's vote to close the case and dismiss the remainder of Plaintiffs' administrative complaint against Unknown Respondent(s), Plaintiffs filed the instant action in the United States District for the District of Columbia.

ARGUMENT

I. The Standard of Review

In evaluating a defendant's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court "must accept the factual allegations in the complaint as true," *Info. Handling Serv., Inc. v. Defense Automated Printing Serv.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003), and "should be construed favorably to the pleader," *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *accord Herron v. Veneman*, 305 F. Supp. 2d 64, 69 (D.D.C. 2004). Further, the Court

may consider the complaint "supplemented by undisputed facts evidenced in the record or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). "[S]hould the trial court look beyond the pleadings, it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties." *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992). "Indeed, this Court has previously indicated that ruling on a Rule 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction." *Id.*

For a motion brought under Rule 12(b)(6), the Court is limited to considering the facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record. *See E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). "The moving party's 'factual allegations, if in agreement with plaintiff['s], only reinforce plaintiff['s] case; if in disagreement, they must be ignored." *United States v. Sum of $70,990,605*, 4 F. Supp. 3d 189, 196 (D.D.C. 2014) (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984) (en banc) *judgment vacated on other grounds*, 471 U.S. 1113 (1984)). A plaintiff receives the "benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

In resolving questions of law, the court may defer to certain agency interpretations under the rubric of *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), where appropriate. *Chevron* deference is not appropriate, however, to an agency's litigation position. *Village of Barrington, III v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). *Chevron* deference is also not

appropriate for agency interpretations of statutes of general application, like the APA. *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991). Finally, *Chevron* deference is not appropriate for agency interpretations of provisions that "confer jurisdiction on the federal courts," like 52 U.S.C. § 30109(a)(8). *Murphy Expl. and Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001).

II. The Court Has Jurisdiction to Hear Plaintiffs' Challenge the FEC's Dismissal of Their Complaint Against the True Source of the Contribution

The FEC argues that the Court lacks jurisdiction to hear this case. But the FEC's arguments rely on mischaracterizations of Plaintiffs' claims and of the records, and its argument is wholly unsupported by authority.

A. Plaintiffs Challenge the Dismissal Below, Nothing Else

As a preliminary matter, much of the FEC's argument is based on a simple mischaracterization of Plaintiffs' suit. The FEC contends that Plaintiffs seek to challenge the terms of the conciliation agreement it entered into with some respondents and seek to challenge the FEC's decision whether to enforce outstanding subpoenas. FEC Br. 1, 15, 16. It argues that the Court has no jurisdiction to hear those challenges. *Id.* But the FEC simply misconstrues Plaintiffs' suit: this suit challenges the FEC's dismissal of Plaintiffs' administrative complaint, a common and routinely heard cause of action.

The basis for this lawsuit is simple. Plaintiffs filed an administrative complaint naming as a respondent Unknown Respondent, which Plaintiffs identified as the true source or sources of the contribution. Compl. ¶ 24; *see also* Ex. A (Admin. Compl.) ¶¶ 26–27. The FEC dismissed that claim. Compl. ¶ 32, Ex. 3. Consequently, Plaintiffs are "aggrieved" parties who may seek judicial redress under 52 U.S.C. § 30109(a)(8)(C). *See CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (permitting CREW to sue under essentially identical facts); *see also FEC v. Akins*,

524 U.S. 11, 19–26 (1998) (complainant deprived of information required to be disclosed under FECA is aggrieved and has standing to sue to challenge dismissal).

By this suit, Plaintiffs do not claim that the FEC should have negotiated a greater financial penalty against the parties to the conciliation agreement. Nor do Plaintiffs claim that those parties should be forced to make some disclosure themselves that is not part of the conciliation. Plaintiffs also do not seek an order requiring the FEC to start litigation to enforce the subpoenas it issued but then let be ignored. Rather, Plaintiffs seek a declaration pursuant to 52 U.S.C. § 30109(a)(8)(A) that the FEC's decision to dismiss Plaintiffs' claims against the true source Unknown Respondent—whether the Does are properly understood to be Unknown Respondents (Compl. Claim 1) or whether some other party or parties are Unknown Respondents (Compl. Claim 2)—is "contrary to law," and an order that the FEC conform with such declaration within thirty days. Of course, in determining whether a dismissal is "contrary to law," the Court will look to the justification for the agency action that led to dismissal. *See CREW v. FEC*, No. 16-cv-2255, 2018 WL 1401262, at *1 (D.D.C. Mar. 20, 2018)(reviewing Commission's failure to find reason to believe which led to dismissal). Thus, to the extent the FEC raises facts surrounding the conciliation agreement as justifications for the ultimate dismissal, those facts are relevant. Nonetheless, this lawsuit is not a "collateral attack" on the conciliation agreement. *Cf.* FEC Br. 15.

B. The FEC Dismissed Plaintiffs' Claim Below

The FEC's mischaracterization of Plaintiffs' claims appears based on its mistaken assertion that there was, in fact, no dismissal below. *See* FEC Br. 1 ("[T]he Commission did not dismiss plaintiffs' administrative complaint."). First, the FEC contends there was no dismissal because the FEC entered into a conciliation agreement with some other respondents. FEC Br.

10–16. The FEC also asserts there was no actual dismissal here against Unknown Respondent because the FEC only voted to "take no action at this time," FEC Br. 15, that judicial review of the dismissal of an unknown respondent is improper, FEC Br. 20, and the FEC's conciliation with GI LLC, a party not identified in Plaintiffs' administrative complaint, somehow resolved the complaint, FEC Br. 18. The FEC's arguments, however, fail to undermine this Court's jurisdiction over this suit.

1. The FEC's Conciliation with Some Respondents Does Not Prevent Review of Its Dismissal of Plaintiffs' Claims Against Other Respondents

The FEC first asserts that there is no dismissal for the Court to review because it reached a conciliation with regard to respondents other than Unknown Respondent(s), and conciliation agreements are not subject to judicial review. FEC Br. 10. This contention is meritless and contravenes authority of this court.[6]

Courts repeatedly have held that a conciliation agreement that encompasses some but not all claims or respondents does not deprive a court of subject matter jurisdiction over the unaddressed claims or respondents. In *Common Cause v. FEC (Common Cause I)*, the court considered a challenge brought by a complainant when the FEC dismissed some of the complainant's claims against the National Republican Senatorial Committee ("NRSC") and entered a conciliation agreement as to others. 729 F. Supp. 148, 151 (D.D.C. 1990). All of the claims stemmed from the same administrative complaint alleging various violations of law from

[6] There is no dispute that Unknown Respondent was not part of the conciliation agreement below. *See* Compl. Ex. 3 at 7 (providing signature places for all parties to the agreement). In fact, the FEC recognizes that the proceedings below do not prevent it from pursuing Unknown Respondents further. FEC Br. 19 n.2 (stating that a conciliation is only a bar to proceeding for "'specific violation[s]' by particular 'person[s]'" who are party to the agreement (quoting 52 U.S.C. § 30109(a)(4)(A)(i)) and that the Does were not among those particular persons who are parties to the conciliation).

the same mass-mailing by the NRSC. *Id.* at 149–50. The FEC entered into a conciliation agreement with the NRSC for four of the five alleged violations for which the OGC found probable cause, but deadlocked 3-3 on the fifth. *Id.* at 151. Nevertheless, even though the FEC had entered into a conciliation with the respondent, and the conciliation agreement covered violations of law stemming from the same event and alleged in the same administrative complaint as the single dismissed claim, the court found that it had "jurisdiction over th[e] action pursuant to [52] U.S.C. § [30109](a)(8)(A)." 729 F. Supp. at 151.

Faced with this authority, the FEC simply asserts that the case should be ignored and that the court's "jurisdictional defect" was "unaddressed." FEC Br. 19. But the court *did* address its jurisdiction and squarely found that it had jurisdiction. *Common Cause I*, 729 F. Supp. at 151. The FEC may believe that finding was in error, but it provides absolutely no basis in law or reason for the Court to disregard the ruling.

In fact, the district court's jurisdictional determination was not questioned by the D.C. Circuit when it reviewed the decision after a challenge by an unsuccessful post-judgment intervenor. *See Common Cause v. FEC*, 923 F.2d 200 (D.C. Cir. 1990) (per curiam). Though focused on the question of whether the denial of the motion to intervene was correct, the D.C. Circuit noted the lower court judgment in favor of Common Cause and the intervenor's criticism of that decision. *Id.* & n.*. Despite the D.C. Circuit's obligation to assure itself and the lower court judgment of jurisdiction, the D.C. Circuit did not question the lower court's authority to issue its ruling. *Id.*

Nor is *Common Cause I* an outlier. In an earlier case, also titled *Common Cause v. FEC (Common Cause II)*, 489 F. Supp. 738 (D.D.C. 1980), the court considered a challenge brought under the FECA's "failure to act" provision. *Id.* at 740. That provision, also found in 52 U.S.C.

§ 30109(a)(8)(A), allows "[a]ny party aggrieved" to sue to challenge "a failure of the Commission to act on [a] complaint," just as the dismissal provision in the same section allows for judicial review of dismissals of complaints. The court's jurisdiction over either prong is the same: this court may hear a challenge by a "party aggrieved" by the agency's dismissal or failure to act. *Id* at § 30109(a)(8)(C). In *Common Cause II*, the administrative complaint named a number of respondents. 489 F. Supp. at 740. Eventually, the FEC executed conciliation agreements with most of them. *Id.* The complainant nonetheless sued, challenging both the time it took to enter into conciliation agreements and the failure to act against the remaining respondents. *Id.* The court dismissed the complainant's challenges to the speed of the conciliation agreements, *id.* at 744, but still went on to order relief with respect to the failure to act on the remaining respondents, *id.* at 740, 745.

Those decisions were rightly decided. The FECA provides aggrieved parties with the opportunity to seek judicial review to ensure that the FEC "does not shirk its responsibility." *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) ("DCCC") (quoting 125 Cong. Rec. S. 36,754). It would be absurd to read the judicial review provision to contain a loophole that would allow the FEC to shirk its responsibility as to all but one claim or one respondent.

The FEC's interpretation is even more absurd because it is easily circumvented and it would make this Court's jurisdiction depend solely on the number of complaints Plaintiffs submitted. Had Plaintiffs filed a single complaint for each respondent, the FEC would concede that a dismissal occurred when it closed the file on Plaintiffs' allegations against Unknown Respondent. There is no basis to assume, however, that Congress intended to premise this Court's jurisdiction on to review under 52 U.S.C. § 30109 on whether multiple respondents were

consolidated into a single complaint or farmed out into individual complaints. Rather than incentivize a multiplicity of filings, Congress's grant of review under § 30109 sensibly allows review of partial dismissals.

Lastly, the FEC also appears to argue that, because the conciliation agreement "resolved the alleged violations," Plaintiffs have no standing even if there was a dismissal below because they have suffered no injury. FEC Br. 1, 7, 10. But the conciliation agreement did no such thing. Plaintiffs' injury is their "inability to obtain information that Congress has decided to make public." *Spokeo, Inc. v. Robin*s, 136 S. Ct. 1540, 1549 (2016) (citing *Akins*, 524 U.S. at 20–25; *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989)); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("Shays's injury in fact is the denial of information he believes the law entitles him to."); *see also CREW v. FEC*, 243 F. Supp. 3d 91, 101–02 & n.5 (D.D.C. 2017) (holding voter and CREW had standing to challenge deprivation of information required to be reported under FECA). Plaintiffs are entitled to know the identity of the true source or sources of the contribution to Now or Never PAC. 52 U.S.C. § 30104(b)(3)(A); *Hsia*, 176 F.3d at 524. The law imposes a duty both on the recipient of the contribution as well as the contributor itself to ensure the contribution is accurately reported. 52 U.S.C. § 30122 (prohibiting both the making and the receipt of a contribution in the name of another); 11 C.F.R. § 110.4 (same). By making a contribution in the name of another, Unknown Respondent(s) deprived Plaintiffs of the information to which Plaintiffs are entitled under the FECA. By granting relief here, the court could remedy that injury. Should the Court issue a ruling favorable to the Plaintiffs, the FEC will either conform to that ruling or Plaintiffs would be allowed to bring their own civil action to discover the true sources' identities. *See* 52 U.S.C. § 30109(a)(8)(C) (permitting citizen suits in complainants' own name if FEC will not conform).

Nothing in the conciliation agreement, however, remedies this injury. While the FEC imposed a significant fine and identified one additional link in the contribution chain, it has not identified or publicized the identity of the true source. Plaintiffs' injury remains.

Simply put, the FEC's conciliation with some respondents does not immunize its dismissal of Plaintiffs' claims against another respondent. Nor did it remedy Plaintiffs' informational injury. Consequently, the Court has jurisdiction to review that dismissal.[7]

2. <u>The FEC Dismissed Plaintiffs' Claim Against Unknown Respondent(s)</u>

In addition to arguing that the conciliation with some respondents divests this Court of jurisdiction, the FEC argues there was in fact no dismissal to review. The FEC argues that, the commissioners' vote to take no action on Plaintiffs' claim against Unknown Respondent(s) was not a dismissal, there cannot be a dismissal of a claim against Unknown Respondent(s) that is subject to judicial review, and that the enforcement action against a different party, GI LLC, means there was no dismissal of Plaintiffs' claim. Those arguments fail because the facts show that there was dismissal subject to review under § 30109(a)(8)(C).

a. The FEC Dismissed When it Closed the File on Plaintiffs' Complaint

First, the FEC claims that there was no dismissal because the commissioners never voted to explicitly dismiss any of Plaintiffs' claims. FEC Br. 15. Rather, they only voted to "[t]ake no action at this time" on OGC's recommendation to find reason to believe the Does were the true source of the contribution. *Id.* (emphasis omitted). But the FEC did not follow this vote with a

[7] The FEC's finally asserts that "[e]ven if a dismissal could occur by virtue of some persons named in an administrative complaint not being party to a conciliation agreement, plaintiffs do not make a compelling case for that novel holding given how many parties were included here." FEC Br. 18. But plaintiffs do not have to bring a "compelling case" to satisfy Rule 12(b)(1) or Rule 12(b)(6)—there merely need bring a "case," *see* U.S. CONST. art. III, § 2, cl. 1. Plaintiffs have done that.

decision to take up Plaintiffs' allegations at a later time. Rather, the commissioners voted to close the file on Plaintiffs' claim, including the OGC's recommendations against the Does and Plaintiffs' allegations against the true source/Unknown Respondent(s). Compl. ¶ 32, Ex. 8. The decision to close the file without completing enforcement action against the true source of the contribution constituted a dismissal within the meaning of § 30109(a)(8)(C).

This process—the closing of the FEC's file after a failure to find reason to believe or a vote to take no action—is how dismissals commonly occur at the agency. For example, in MUR 6471, the FEC voted to "take no action" on the OGC's recommendation to find the respondent violated certain provisions of the FECA. *See* Certification, MUR 6471 (Sept. 16, 2014), https://bit.ly/2FxDmYN. This constituted a dismissal when the FEC later voted to "[c]lose the file" without taking action on those recommendations. *See* Certification, MUR 6471 (Oct. 1, 2015), https://bit.ly/2HGyCpD; *see also CREW v. FEC*, 236 F. Supp. 3d 378, 382 (D.D.C. 2017) (referring to action as "dismissal").[8]

The FEC also states that the vote to take no action was "followed by further enforcement action and approval of a conciliation agreement." FEC Br. 15. The FEC's statement misleadingly slides between two sets of respondents, however. The FEC took subsequent action against and approved a conciliation agreement with Now or Never PAC, ACU, GI LLC, and Thomas. Compl. ¶ 30, Ex. 8. The FEC took no further enforcement action, however, against Unknown Respondent(s) or the Does. Compl. ¶ 32, Ex. 8. The decision to close the file without

[8] *See also* Certification, MUR 6589 (June 24, 2014), https://bit.ly/2rlLrew (showing Commission deadlocked on recommendation then voted to close the file); *CREW v. FEC*, 209 F. Supp. 3d 77, 80 (D.D.C. 2016) (referring to action in MUR 6589 as a "dismissal").

taking action against the true source constituted a dismissal, regardless of whatever action that FEC took with respect to other respondents. *See Common Cause II*, 489 F. Supp. at 745.[9]

Accordingly, the FEC's argument that there was no dismissal below is simply incorrect: the Commission's failure to take enforcement action against the true source of the contribution, and in particular its vote to take no action on the OGC's recommendation to find reason to believe the Does violated the law due to being the true source of the contribution, turned into a dismissal when the FEC voted to close the file.[10]

b. Courts May Review the Dismissal of Claims Against an Unknown Respondent

Next, the FEC claims that, even if a dismissal occurred, the Court cannot review it, because to do so would "constitute an unauthorized expansion beyond what Congress contemplated in [§] 30109(a)(8)," *i.e.*, it would allow a complainant to "challenge the depth of the Commission's investigation into the 'true source.'" FEC Br. 20. The FEC's arguments are meritless, however.

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[9] *See also Common Cause I*, 729 F. Supp. at 151 (stating FEC "dismissed" Common Cause's allegation); MUR File 2282 at 557, https://bit.ly/2FynzIY (July 26, 1988 certification of Commission vote in MUR 2282, the underlying MUR for *Common Cause I*, showing Commission deadlocked 3-3 on Common Cause's claim); *id.* at 568 (December 23, 1988 certification of Commission vote in MUR 2282 showing subsequent action accepting conciliation on Common Cause's other claims, then "[c]los[ing] the file").

[10] The FEC also oddly posits in a footnote that, under Plaintiffs' reading, the suit here is time barred because it was not brought within sixty days of the vote to take no action. FEC Br. 13 n.1. The dismissal occurred, however, when the FEC closed the file on Plaintiffs' complaint without taking action. *See CREW*, 236 F. Supp. 3d at 388 (referring to vote to close file as "dismiss[al]"); *see also Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) (referring to dismissal dated January 9, 1991); Certification, MUR 2163 File at 618 (Jan. 9, 1991), https://bit.ly/2FyJv6F (certification vote involved in *Spannaus v.* FEC, 990 F.2d 643 (D.C. Cir. 1993), voting to "[c]lose the file in this matter"). Here, the FEC voted to close the file on October 24, 2017. Compl. Ex. 8. That was when dismissal occurred and Plaintiffs' suit was brought within sixty days of that dismissal.

First, the FEC concedes that the use of the term "Unknown Respondent" or other "fictitious names is permitted where justified in complaints filed with the FEC." FEC Br. 20. This is consistent with the FEC's longstanding practice. "[T]he Commission has construed the FECA for many years to permit investigations against unknown violators." *FEC v. Franklin*, 718 F. Supp. 1272, 1276 (E.D. Va. 1989), *vacated in nonrelevant part*, 902 F.2d 3 (4th Cir. 1989) (Mem.) (changing response dates for subpoena but otherwise affirming).[11]

Second, courts have considered challenges to dismissals of claims against unknown respondents. For example, in *Campaign Legal Center v. FEC* (*CLC*), 245 F. Supp. 3d 119 (D.D.C. 2017), the court heard CLC's challenge to the dismissal of its claims that several individuals violated the FECA's straw-donor laws, *id.* at 123. CLC's administrative complaints included allegations against "John Doe, Jane Doe, and other persons" who were the "true contributor(s)," *i.e.*, unknown respondents. Complaint ¶¶ 1, 13, MUR 6487 (Aug. 11, 2011) https://bit.ly/2rcpIFa. Nevertheless, the district court held that it had jurisdiction to hear CLC's challenge to the dismissal of its claims, including those against the unknown respondents. *CLC*, 245 F. Supp. 3d at 126. Indeed, the court found subject matter jurisdiction existed largely because CLC was unaware of the true sources of the conduit contributions. *Id.*; *see also id.* at 127 (fact "the Commission's General Counsel did not believe it knew the entire story about the contributions" supported finding jurisdiction).

[11] The FEC's enforcement manual recognizes one purpose of an investigation is to "[i]dentity[] . . . unknown respondents." OGC Enforcement Manual § 5.1.2. The FEC routinely considers complaints against unknown respondents and proceeds with enforcement actions against them, including investigations to identify them. *See, e.g.*, Certification, MUR 6838 (Nov. 19, 2015), https://bit.ly/2w2laH8 (finding reason to believe "Unknown Respondent" violated the FECA, authorizing investigation to identify unknown respondent); Second General Counsel's Report, MUR 6838 (May 26, 2016) https://bit.ly/2rhjvYr (reporting on investigation into Unknown Respondent and identifying real name of Unknown Respondent).

Similarly, here, Plaintiffs' challenge the dismissal of their claims against Unknown Respondent(s) who are the true source of the contribution. Just as the court in *CLC* had jurisdiction to hear that challenge, so too does the Court here.

In contrast to this authority, the FEC cites nothing to support its conclusion that judicial review here is "beyond what Congress contemplated." *See* FEC Br. 20. The purpose of the judicial review provision, however, is to ensure the FEC does not "shirk its responsibility" by, for example, allowing the true source of a contribution to remain hidden. *See DCCC*, 831 F.2d at 1134 (quoting 125 Cong. Rec. S. 36,754). There is thus no reason to think Congress intended to exclude from judicial review dismissals of complaints against unknown respondents.

The FEC simply assumes Congress would exclude review of the dismissal of a claim against an unknown respondent, notwithstanding this authority and the plain language and purpose of the statute, because review would permit a complainant to "challenge the depth of the Commission's investigation into the 'true source.'" FEC Br. 20. As an initial matter, the FECA applies equally to the true source who uses one straw donor and to the true source who uses two or more. And it equally subjects the FEC's nonenforcement decisions against either true source to judicial review, "no matter how many persons transferred the funds." *Cf.* FEC Br. 20.

Nor is there any concern that such review would hijack agency resources and commit it to a laborious investigation. If the FEC simply does not think it is worth its time to pierce those straw donors, the result of finding the dismissal contrary to law would not force it to act. *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (holding court may not compel agency action under § 30109(a)(8)(C)). Rather, the court merely puts a choice to the FEC: it may reopen its investigation and conform with the court's judgment, or it may not, in which case the complainant is permitted to pursue their own civil action. *See* 52 U.S.C. § 30109(a)(8)(C)

(providing failure to conform results in permitting "complainant [to] bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint"); *see also, e.g.*, Compl., *CREW v. Am. Action Network*, 18-cv-945 (D.D.C. filed Apr. 23, 2018) (citizen suit brought by CREW against respondent after FEC's dismissal declared contrary to law and FEC failed to conform). The FEC maintains control of its investigations and resources.

In sum, the FEC cites nothing to support its assertion that judicial review of dismissals of claims against unknown respondents is outside the scope of § 30109(a)(8)(C). In fact, judicial review is available for such dismissals, including dismissals against unknown true sources of contributions. *See CLC*, 245 F. Supp. 3d at 126. The FEC's concerns about challenges to the "depth" of its investigation are simply irrelevant: whether it commits any additional resources to take its investigation deeper is wholly up to it and not an issue that will be decided in this litigation.

c. Enforcement Against GI LLC Does Not Prevent Judicial Review of the FEC's Dismissal of Plaintiffs' Claims Against the True Source of the Contribution

The FEC further argues that there was no dismissal against any respondent identified by Plaintiffs because the agency substituted GI LLC for Unknown Respondent(s) named in Plaintiffs' administrative complaint. FEC Br. 18–19. But this does not accord with the facts in the record, because GI LLC is not the true source. It is only the next link in the money chain.

Plaintiffs identified Unknown Respondent(s) in its administrative complaint as the true source of the contribution to Now or Never PAC. Compl. ¶ 24; Ex. A (Admin. Compl.) ¶ 12. While the Commission substituted GI LLC for Unknown Respondent in its January 24, 2017 reason-to-believe vote, *see* Compl. Ex. 6, Ex. 7, that only worked to substitute GI LLC for the determination that there was reason to believe the immediate provider of funds to ACU violated

52 U.S.C. § 30122. The OGC's report with respect to GI LLC provides no indication that the OGC thought that GI LLC was the true source of the contribution, nor did it recommend making such a finding. Ex. C (2d OGC Rep.) at 3–4 (recognizing only that GI LLC "made the contribution" to ACU and that Thomas "sent the contribution to ACU from GI LLC," but no finding that GI LLC arranged for its money to finance the donation). In fact, the OGC stated that it still required discovery to determine the "source of the funds Thomas wired" from GI LLC to ACU, noting that "[t]he current record is unclear as to whether Thomas provided the funds to the GI LLC account, *or whether other parties were involved.*" *Id.* at 8 (emphasis added).

The OGC subsequently learned that other parties were definitely involved. It identified the Does as entities that provided the funds to GI LLC, concluding that "[t]he record supports a reasonable inference that [one or both of the Does] was the true source of the funds GI LLC funneled through ACU." Compl. Ex. 2 at 9. The OGC designated the Does as respondents to Plaintiffs' complaint: *i.e.*, it designated them as Unknown Respondents. *Id.* at 3 n.5. The OGC also left open the possibility that, because of the obstruction of subpoenaed parties, even more parties were involved. *Id.* at 13–14.

Thus, the Commission's decision to find reason to believe GI LLC violated the FECA by acting as a pass-through who, along with ACU, worked to shield the identity of the true source, did not resolve Plaintiffs' claim against Unknown Respondent(s). Plaintiffs identified Unknown Respondent(s) in the administrative complaint not as merely the most immediate link in the chain in the contribution to ACU but rather as the "true source" of the contribution. Compl. ¶ 24; Ex. A (Admin. Compl.) ¶ 12. It is indisputable that the true source was not a party to the conciliation and that the FEC dismissed Plaintiffs' claim against them.

Indeed, the FEC's own actions demonstrate it knew it was dismissing Plaintiffs' claim against the true source. After voting to close the file, two of the three commissioners who voted not to proceed against the true source issued a Statement of Reasons to justify their vote. Compl. ¶ 32, Ex.5. In the commissioners' own words, they were explaining their decision "not to enforce." Compl. Ex. 5 at 5 (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985), for applicable standard to support the action, *i.e.*, a decision not to enforce); *see also id.* at 1 (stating the commissioners "voted to enforce the Act against three respondents—ACU, Now or Never PAC, and GI, LLC—but not to add the fourth organization [redacted]"); *id.* at 2 (justifying decision not to enforce due to "scant legal precedent applying 52 U.S.C. § 30122's 'true source' rule to funders three or four layers behind the reportable contribution to a Super PAC").[12]

In sum, there is no serious dispute that the FEC dismissed claims against the true source of the contribution to Now or Never PAC, whether that true source includes the Does or not. The FEC's proceedings against GI LLC, while appropriate, did not resolve Plaintiffs' claim against Unknown Respondent(s). Its substitution of GI LLC for Unknown Respondent(s) in its prior reason to believe finding did not and could not alter or amend Plaintiffs' complaint or remove Plaintiffs' claims against the true source of the contribution. The Plaintiffs properly named an unknown respondent or respondents by utilizing a common moniker of "Unknown

[12] Prior to this motion, counsel for the FEC shared the same understanding that the events that transpired below constituted a dismissal. *See* FEC Resp. to Mot. for TRO and Mot. to Seal at 2, *Doe v. FEC*, 17-cv-2694 (ABJ) (D.D.C. Dec. 20, 2017), ECF No. 16 ("The Commission also agreed to close the filing following entry of this conciliation agreement, effectively concluding the enforcement and subpoena proceedings against [the Does]."); *see also* FEC Surreply in Resp. to Pls.' Reply Mem. in Supp. of Their Mot. for a Prelim. Inj. at 6, *Doe v. FEC*, 17-cv-2694 (ABJ) (D.D.C. Jan. 18, 2018) (citing importance of public disclosure in "dismissal cases" to justify disclosing names of Does in administrative matter below); *see also id.* at 10–11 (arguing Does were "the subject of proceedings below" that resulted in deadlock, and "the statute compels [the] FEC to dismiss complaints in deadlock situations" (internal quotation marks omitted); *id.* at 13 ("Proceedings against [the Does] thus were both initiated and terminated.").

Respondent" and identifying that respondent as the true source or sources of the contribution. The true sources were not parties to the conciliation agreement, and the FEC dismissed Plaintiffs' claim against the true sources when they closed the case file without proceeding with enforcement against Unknown Respondent(s). [13]

C. The FEC's Prosecutorial Discretion Does Not Immunize Review and Cannot Justify a Motion to Dismiss

Interspersed through its brief, the FEC makes numerous references to its prosecutorial discretion and asserts that that discretion not only justifies the dismissal below on the merits, but in fact deprives this court of jurisdiction to even hear this suit. For the reasons discussed above, whatever discretion the FEC may have about the scope of a conciliation agreement, *see* FEC Br. 14, or the depth of its investigation, *id.* at 17, does not deprive the court of jurisdiction to hear a claim that the FEC dismissed a respondent who was not a party to that conciliation and whose identity remains hidden. Further, the FEC simply misstates the import and effect of its discretion.

[13] Further, although the FEC does not repeat the argument here, it suggested in prior briefing that the proceedings against the Does were an "internally-generated matter[]" and did not stem from Plaintiffs' complaint. *Id.* That suggestion is belied by Plaintiffs' allegations and the record. Compl. ¶ 27 (FEC's identification of Does resulted from investigation into Plaintiffs' complaint); *id.* ¶ 31 (vote on OGC recommendation of Does occurred in proceedings on Plaintiffs' complaint); Compl. Ex. 2 (OGC report recommending reason to believe Does violated FECA in report issued under MUR 6920); Compl. Ex. 4 (Certification in MUR 6920 of Commission vote deadlocking on recommendation against Does); Compl. Ex. 5 (commissioners' Statement of Reasons to dismiss remaining claims in MUR 6920); Letter from Jeff Jordan to Anne Weismann, Mar. 4, 2015 (attached as Ex. F) (stating Plaintiffs' complaint was designated MUR 6920). While the FEC's investigation ultimately identified the Does and amassed the evidence to support a reason to believe finding against them, the proceedings against them were generated from Plaintiffs' request for an investigation into the true source of the contribution to Now or Never PAC. The proceedings against the Does were not internally-generated, and the dismissal of those proceedings was the dismissal of proceeding on Plaintiffs' complaint.

First, while the FEC has "discretion about whether or not to take a particular action," *Akins*, 524 U.S. at 25, an exercise in prosecutorial discretion to dismiss a case is at least subject to judicial review to determine whether it is arbitrary and capricious or based on legal error. *See CREW v. FEC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016) (finding agency's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) is only "presumptively unreviewable" and may be rebutted, and that the "FECA's express provision for judicial review . . . is just such a rebuttal"); *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 n.5 (D.D.C. 2014) (noting FEC's exercise of prosecutorial may be found arbitrary and capricious).[14]

Thus, prosecutorial discretion is, at best, a defense the FEC may raise on the merits, rather than in support of a motion to dismiss. *District Hosp. Partners, L.P. v. Sebelius*, 794 F. Supp. 2d 162, 170–73 (D.D.C. 2011) (noting resolution of whether agency action is arbitrary or capricious would be "premature" on motion to dismiss, discussing circuit precedent). That is particularly true where the FEC has not produced the record the commissioners had before them to show whether any such discretion could be justified. "Without the administrative record, the court is unable to perform [the] function" of determining whether an agency action is arbitrary or capricious. *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 88 (D.D.C. 2010); *see also DCCC*, 831 F.2d at 1133–34 (rejecting FEC's argument that its exercise of prosecutorial

[14] *See also Akins*, 524 U.S. at 25 ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."); *Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc)("If [enforcement discretion] were to mean that an agency's *legal* determination was not reviewable, that would virtually end judicial review of agency action."), *vacated by* 524 U.S. 11; *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) (prosecutorial discretion must be based on "reasonable grounds"); *Antosh v. FEC*, 599 F. Supp. 850, 856 n.5 (D.D.C. 1984) ("While the Commission is vested with some prosecutorial discretion, its actions cannot escape review.").

discretion could justify dismissal without review of record).[15] The Court here allowed the FEC in this case to defer production of the record otherwise required to be produced under Local Civil Rule 7(n)(1) because the motion raised "questions of law" alone. *See* Minute Order (D.D.C. Apr. 10 2018). As a matter of law, a dispositive motion based on prosecutorial discretion cannot be decided without access to the whole record, and thus the FEC's motion fails.

Second, as noted above, the result of a finding that a dismissal was contrary to law does not command reversal of the FEC's discretionary choices. *See supra* pp. 24–26. The FECA provides that, even after a judicial decision that a dismissal was contrary to law, the FEC retains its discretion about "whether or not to take a particular action," *Akins*, 524 U.S. at 25. If the FEC chooses not to act, then FECA authorizes a citizen suit. 52 U.S.C. § 30109(a)(8)(C). It would be exceedingly odd, therefore, that the FEC's decision to preserve its resources would deprive a complainant the opportunity to spend the complainant's own resources pursuing the investigation in a civil action. And, there is no reason to think it does. *See Akins*, 524 U.S. at 26 (rejecting FEC's suggestion that its prosecutorial discretion altered the task placed before courts under § 30109(a)(8)(C)).[16]

Indeed, it is notable that the FEC's only authority for its expansive claim of prosecutorial discretion is a Senator's floor statement that the FECA's judicial review provision is "not

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[15] *See also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F. 2d 788, 792 (D.D.C. 1984) ("[T]o review an agency's action fairly [under arbitrary and capricious standard], [the court] should have before it neither more nor less information than did the agency when it made the decision."); *cf. La Botz*, 61 F. Supp. 3d at 34–35 (citing in *dicta* as third reason to dismiss that plaintiff failed to overcome FEC's prosecutorial discretion which full record demonstrated was justified).

[16] The D.C. Circuit is currently considering an appeal addressing the question of whether the FECA's citizen suit provision, as well as the other statutory text of § 30109, renders the FEC's prosecutorial discretion irrelevant to a court's determination of whether a dismissal is contrary to law. *See CREW v. FEC*, 17-5049 (D.C. Cir. filed Mar. 21, 2017).

intended to work a transfer of prosecutorial discretion from the Commission to the Courts." FEC Br. 14 (quoting 125 Cong. Rec. 36,754 (1979)). The D.C. Circuit considered this very statement in *DCCC* and found it insufficient to deprive the courts of judicial review of the FEC's decision to dismiss claims against a respondent. *DCCC*, 831 F.2d at 375 (quoting 125 Cong. Rec. 36,754 (1979) and finding "we cannot regard Senator Pell's floor statement as controlling our decision on DCCC's plea for judicial review"). For the same reasons, that statement does not work to alter the application of § 30109(a)(8)'s judicial review provisions here.

In sum, the FEC's prosecutorial discretion, whatever it may be, does not deprive this court of jurisdiction to hear Plaintiffs' suit. In fact, is would not even work to justify the dismissal on the merits, and certainly cannot justify a dismissal based on an incomplete record.

III. If Plaintiffs' Claims Are Unreviewable Under the FECA, then Review is Available Under the APA

Finally, the FEC seeks to dismiss Plaintiffs' claims brought under the APA because the FEC asserts that § 30109 review is the exclusive means for judicial review of FEC actions. FEC Br. 20–25. That is incorrect. APA relief is available in cases in which "there is no other adequate remedy." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). "An alternative remedy will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'" *Id.* Accordingly, judicial review of FEC actions is available under the APA where the review is not available or doubtful under § 30109. *See Unity08 v. FEC*, 596 F.3d 861, 866–67 (D.C. Cir. 2010) (holding § 30109 did not preclude APA review of FEC's advisory opinions); *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (holding § 30109 did not preclude APA review of FEC's

regulations); *Perot*, 97 F.3d at 560–61 (same).[17] Accordingly, to the extent there is any doubt about the ability of Plaintiffs to obtain their requested relief under the FECA because the decision below was not, as the FEC contends, the dismissal of an enforcement action, then the FECA does not provide an adequate alternative remedy and Plaintiffs may seek such remedy under the APA.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request the Court deny the FEC's motion to dismiss.

Respectfully submitted,

May 4, 2018

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[17] In this context, the FEC misstates the holdings of two decisions in suits brought by plaintiff CREW. In *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017), the court noted that § 30109 provides for exclusive review of agency dismissals, not exclusive review for any and all agency actions. *Id.* at 104. In fact, in that case, the court went on to hold that CREW could bring an APA claim to challenge FEC action for which § 30109 did not provide adequate relief. *Id.* at 105. Similarly, in *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015), the court held § 30109 provided the exclusive means to challenge the legality of agency dismissals and that CREW could not bring an APA claim to challenge an alleged *de facto* rule the agency applied in those dismissals. *Id.* at 120 (finding "the crux of CREW's complaint is that the FEC dismissed its earlier administrative complaints under a faulty and misguided rationale"). Neither of these cases hold what the FEC proposes here: that APA review is unavailable for an action the FEC maintains was not a dismissal subject to § 30109 review.